

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH KAZAKEVICIUS,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 232682

Oakland Circuit Court

LC Nos. 00-172623-FC;

00-172624-FC;

00-172625-FH

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to 17 ½ to 40 years' imprisonment on the first-degree criminal sexual conduct convictions and 7 to 15 years' imprisonment on the second-degree conviction. Defendant appeals as of right. We reverse and remand for a new trial.

We conclude that defendant was entitled to the victim's counseling records and that the failure to provide those records requires a new trial.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence could make the difference between conviction and acquittal. *Id.* The prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses. *Id.* For a defendant to establish a *Brady* violation, he or she must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

The failure to disclose impeachment evidence does not require automatic reversal, even where the prosecution's case depends largely on the credibility of a particular witness. *Id.* at 282. The court must still find that the evidence is material. *Id.* Evidence which is undisclosed is

material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* "Accordingly, undisclosed evidence will be deemed material only if it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.*, citation omitted.

The *Lester* panel stated:

In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [*Id.* at 282-283 (citations omitted).]

In this case, the counseling records in question were in the prosecutor's possession and were effectively suppressed. Additionally, defendant did not possess the evidence and could not have obtained it with reasonable diligence. Indeed, defendant attempted to obtain the counseling records but was prevented from doing so when the court denied his request for an in camera inspection. Further, under the circumstances of this case, where the victim's testimony was the principal evidence against defendant, and where the counseling records could be read to indicate that the victim had suppressed her memories of the alleged sexual abuse for several years; that it was through counseling that these memories resurfaced; that the victim still did not have a complete memory of what allegedly happened; and that the victim's memories may have been triggered by a form of hypnosis during counseling, we are persuaded that the records were favorable to defendant. A reasonable juror could deem inconsistent, the victim's trial testimony and the information contained in the counseling records. Defendant has demonstrated that the counseling records would place the entire case in such a different light as to undermine confidence in the verdict. Thus, there exists a reasonable probability that the result of the proceedings would have been different. The records would have allowed defendant to explore possible alternative explanations for the origin of the allegations of sexual abuse, including whether they were the product of outside influences affecting both the reliability of the allegations and the credibility of the victim. Under the circumstances, the trial court abused its discretion in denying defendant's request for a new trial. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

In light of our disposition, we need not consider defendant's remaining issues on appeal. In the event of a retrial, however, the trial court shall evaluate the admissibility of any expert testimony offered to explain the victim's specific behaviors in light of the principles and restrictions set forth in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). We particularly direct the trial court to pages 373 through 375 of that opinion, which enunciates our Supreme Court's definitive holding on such matters.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ David H. Sawyer

/s/ William B. Murphy